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ORDER GRANTING MOTION TO AUGMENT THE RECORD – Docket No. 37123-2009

documents:

DOCUMENT

EXHIBIT NO.

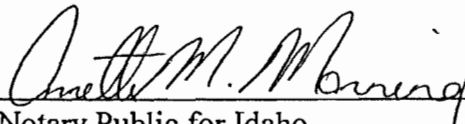
Leonarda A. Cowan Trust 1
Zachery Cowan Will dated 2000 2
Opinion Regarding Summary Judgment dated September 18, 2007,
Cassia County Probate Case No. CV 2006-1234 3



Allen B. Ellis
Attorney for Plaintiff

SUBSCRIBED AND SWORN To before me this 27th day of July, 2009.






Annette M. Manning
Notary Public for Idaho
Residing at Boise
Commission Expires: 1/5/12

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 27th day of July, 2009, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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Allen B. Ellis

MAGISTRATE COURT
CASSIA COUNTY ID

FILED

2007 SEP 18 A 11:10

LARRY A MICKELSEN

BY
DEPUTY

CU

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CASSIA

MAGISTRATE DIVISION

In the Matter of the Estate of

CASE NO. CV 2006-1234

ZACHARY A. COWAN

OPINION REGARDING SUMMARY
JUDGMENT

Deceased.

APPEARANCES:

Stephen D. Westfall, Personal Representative, represented by Donald J.

Chisholm, special counsel for the Personal Representative.

Mary Killins Soignier, Claimant against the estate, represented by Stanley G. Cole
and William Whitehead III, counsel pro hac vice.

American Cancer Society, Claimant against the estate, represented by William A.
Parsons and Lance A. Loveland, Parsons, Smith & Stone, LLP.

PROCEDURAL STATUS.

1. The Personal Representative filed a Petition for Informal Probate of Will and
Informal Appointment of Personal Representative together with the Last Will and
Testament of Zachary A. Cowan, on November 2, 2006. The Magistrate issued

the Informal Probate of Will and Appointment of Personal Representative on November 3, 2006.

2. The Personal Representative issued a Notice and Information to Heirs and Devisees on November 6, 2006. The list of persons to whom notice was provided included Mary Killins Soignier.
3. Ms. Soignier filed a document with the Court entitled Claim of Mary Killins Soignier on January 4, 2007. In paragraph 3 of the document, she claimed entitlement to:

“...all monies distributed to the within Estate since the date of death of Aachary A. Cowan, and all monies yet to be distribute to him, by Shea Capital II, LLC a California limited liability company; J.F. Shea Co., Inc., a California corporation; or other source deriving monies from the sale of certain Antioch, California, properties ownd by the Leonarda A. Cowan Trust.”

4. In paragraph 4 of this document she claimed entitlement to:

“...all funds, revenue, and interests in assets derived directly from the Leonarda A. Cowan Trust, or any other trust interests established by acquisition, sale or exchange which designate Zachary A. Cowan as beneficiary.”

5. The Personal Representative filed the inventory on January 23, 2007. On February 27, 2007 the Personal Representative filed a notice that he was disallowing the claim of Ms. Soignier.
6. On April 11, 2007 the Personal Representative filed a Petition for Construction of

Will and Approval for Plan of Distribution of Estate. On May 25, Ms. Soignier filed an Opposition to Petition for Construction of Will.

7. On July 6, 2007 the American Cancer Society, devisee, filed a motion for summary judgment which requested that the Court enter an order granting construction of decedent's Will as proposed by the Personal Representative.
8. At a hearing on August 8, 2007 counsel for the parties entered into a stipulation that was accepted by the Court regarding the summary judgment motion and the Court entered it as an order on that date.
9. This motion comes by way of the American Cancer Society who seeks summary judgment in regards to Mary Killins Soignier's objection to the plan of distribution as filed by the Personal Representative of the decedent, Zachary A. Cowan.

SUMMARY OF FACTS AND PROCEDURE NOT IN DISPUTE

1. On the 24th day of May, 2005, Zachary A. Cowan executed his last will and testament.
2. The Will was duly witnessed and attested to by the required number of witnesses. The Will is a validly executed testamentary instrument, and Mr. Cowan was competent at the time he executed his Will.
3. No party presents a challenge to the validity of the Will.
4. Zachary A. Cowan died on the 20th day of October, 2006.
5. Mr. Cowan's Will was admitted to informal probate on the 3rd day of November, 2006.
6. Pursuant to the terms of the Will, Stephen D. Westfall was nominated and duly

appointed to be the Personal Representative of the Estate of Zachary A. Cowan, a resident of Cassia County, Idaho.

7. On November 6, 2006 The Personal Representative properly filed a Notice and Information to Heirs and Devisees with the Court.
8. Notice and Information to Heirs and Devisees were served on Samuel D. Cowan, father of Zachary A. Cowan, The American Cancer Society, and Mary Killins Soignier.
9. The Personal Representative filed an inventory of the estate on January 23, 2007.
10. During his lifetime, Mr. Cowan was the beneficiary of a trust created by his mother, Leonarda A. Cowan, of Riverside, California, known as the Leonarda A. Cowan Trust.
11. In his Will, Mr. Cowan directed that all his personal property be distributed according to a written list of items and intended recipients.
12. A written list of items and intended beneficiaries could not be found, nor has one been presented to the Court, and therefore it has been concluded that it does not exist.
13. The only remaining dispositive provision in Mr. Cowan's Will was contained in Clause 6.
14. Clause 6 of the Will directed the residue and remainder of the testator's estate other than beneficial interests in trusts be given to the American Cancer Society, and that all beneficial interests that he had in any trusts be given to Mary Killins. Mary Killins Soignier is the married name of Mary Killins. The parties agree that Ms. Soignier is the person named in the Will in Clause 6 as "Mary Killings".

15. Mr. Cowan signed a document entitled "Compromise, Settlement, Distribution and Release Agreement" regarding the Leonarda A. Cowan Trust on November 22, 2004.
16. Mr. Cowan signed a "Final Release and Discharge" agreement on March 4, 2005. His beneficial interest share in the corpus of The Leonarda A. Cowan Trust was delivered over to him. The Trust was terminated.
17. At the time of his death, Mr. Cowan did not hold or possess any interest in any trusts.
18. The testator's Personal Representative determined that the residue of the testator's estate should be given to the American Cancer Society.

ISSUE

The issue which must be answered by this Court is whether or not to grant summary judgment affirming the Personal Representative's plan for distribution of the disputed estate. To do so requires a conclusion that as a matter of law Mr. Cowan's Will is not ambiguous.

SUMMARY JUDGMENT STANDARDS

This Court will adhere to the following standards in deciding this summary judgment motion:

1. Summary judgment is proper if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Idaho Rules of Civil Procedure, Rule 56(c); *Bonz v. Sudweeks*, 119 Idaho 539, 541, (1991).
2. When a court assesses a motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. *G & M Farms v.*

Funk Irrigation Co., 119 Idaho 514, 517, (1991); Tusch Enterprises v. Coffin, 113 Idaho 37, (1987).

3. Likewise, all reasonable inferences which can be drawn from the record must be drawn in the non-movant's favor. G & M Farms, 119 Idaho at 517; Clarke v. Prenger, 114 Idaho 766, (1988); Sanders v. Kuna Joint School Dist., 125 Idaho 872, (Ct.App.1994).
4. The burden of proving the absence of an issue of material fact rests at all times upon the moving party. McCoy v. Lyons, 120 Idaho 765, 769, (1991); G & M Farms, supra.
5. Nevertheless, when a motion for summary judgment has been properly supported with evidence indicating the absence of material factual issues, the opposing party's case must not rest on mere speculation, and a mere scintilla of evidence is not enough to create a genuine issue of fact. McCoy, 120 Idaho at 769, 820; G & M Farms, 119 Idaho at 517.
6. When a motion for summary judgment is made and supported as provided in the Idaho Rules of Civil Procedure, an adverse party may not rest upon the mere allegations or denials of that party's pleadings. Idaho Rules of Civil Procedure, Rule 56(e).
7. Rather, the adverse party must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. Idaho Rules of Civil Procedure, Rule 56(c).

8. Evidence presented in support of, or in opposition to, a motion for summary judgment must be admissible. *Hecla Min. Co. v. Star-Morning Min. Co.*, 122 Idaho 778, 785, (1992).
9. Supporting and opposing affidavits to summary judgment motions shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Idaho Rules of Civil Procedure, Rule 56(e).
10. This threshold question of admissibility of evidence must be decided "before proceeding to the ultimate issue, whether summary judgment is appropriate." *Ryan v. Beisner*, 123 Idaho 42, 45, (Ct.App.1992).
11. The general rule that all inferences are drawn in favor of the non-moving party does not apply to the initial question of admissibility. *Hecla Min. Co.*, supra.

STANDARDS FOR REVIEW OF A WILL

1. When interpreting a will, the court must give effect to the intention of the testator. I.C. § 15-2-603 states: "The intention of a testator as expressed in his will controls the legal effect of his dispositions. I.C. §15-2-603.
2. The testator's intent is discovered by examining the will, and such intent expressed in the will controls the legal effect of the testator's dispositions. *Steelsmith v. Trout*, 139 Idaho 216 (2003); *In the Matter of the Estate of Howard*, 112 Idaho 306, 308 (1987).
3. If the language of a will is clear and unambiguous, the intent of the testator is derived from the will as it reads on its face. *Allen v. Shea*, 105 Idaho 31, 34 (1983).

4. "[I]n construing the provisions of a will to ascertain the meaning of a testator, the cardinal rule of construction is to ascertain the testator's intent; and ... [t]his intent is to be ascertained from a full view of everything within the four corners of the instrument." *Jones v. Broadbent*, 21 Idaho 555, 559 (1912); *Wilkins v. Wilkins*, 137 Idaho 315 (2002).
5. Because Idaho law requires a testator's intent to be followed, the first step for the court is to determine whether or not the testator's intent is clear and unambiguous. *See Wilkins v. Wilkins*, supra.
6. Whether a will is ambiguous is a question of law for the court to decide. In the *Matter of the Estate of Howard*, supra.
7. A court may only use parole evidence to aid it in determining the intent of the drafter if an ambiguity exists. In the *Matter of the Estate of Howard*, supra.
8. An ambiguity exists when the testator's intent is "reasonably subject to conflicting interpretations." *Dr. James Cool, D.D.S. v. Mountain View Landowners Co-op. Ass'n, Inc.*, 139 Idaho 770, 773 (2004).
9. An ambiguity can be either patent, or latent. In the *Matter of the Estate of Muriel H. Kirk*, 127 Idaho 817, 824 (1995).

DISCUSSION

Ms. Soignier contends that Mr. Cowan's intent in Clause 6 of his Will is ambiguous. The section of the Will at issue is set forth below:

CLAUSE 6 RESIDUE

All of the rest, residue and remainder of my property which I own or have any interest in whatever at the time of my death, other than beneficial interests in trusts, I give, bequeath, and devise to the American Cancer

made a finding as to whether or not an ambiguity exists in the Will, these affidavits may only be used to assist the Court in determining whether or not Ms. Soignier has provided sufficient evidence of an ambiguity. In other words, this Court must decide whether the affidavits provide adequate evidence for the Court to conclude that material facts are in dispute and as a matter of law whether the moving party is not entitled to judgment. In the Matter of the Estate of Howard, supra.

I. MS. SOIGNIER FAILED TO PROVIDE ANY EVIDENCE OF A LATENT AMBIGUITY IN ZACHARY A. COWAN'S WILL.

A latent ambiguity exists when conflicting interpretations are "...not evident on the face of the instrument alone, but becomes apparent when applying the instrument to the facts as they exist." In the Matter of the Estate of Muriel H. Kirk, supra, citing *Williams v. Idaho Potato Starch Co.*, 73 Idaho 13, 20 (1952).

In The Matter of the estate of Muriel H. Kirk, supra, the Idaho Supreme Court found a latent ambiguity in the testator's intent under these facts: the decedent placed a document containing conditional language, which had been attached to an amendment to the Will, inside a three ring notebook containing other estate planning documents. The Court ruled that these facts constituted a latent ambiguity. The Court reached this conclusion by reasoning the act of placing the documents in a notebook was an act of permanence, and this was inconsistent with the conditional language of the attachment to the amendment. The Idaho State Supreme Court reviewed the testator's intent in light of the existing facts.

This Court has reviewed the affidavits submitted by Ms. Soignier and finds they do not provide any facts to support the existence of a latent ambiguity in Mr. Cowan's Will. The affidavits fail to direct the Court's attention to the testator's Will and do not

make specific mention to any terms of the Will. In addition, at page two of her July 26, 2007 Response to the American Cancer Society's "Motion to Strike Affidavits," Ms. Soignier argues, regarding the affidavits upon which she relies, that "...it should be noted that the knowledge expressed in the affidavits is not knowledge of the terms or effect of a will but [is] simply knowledge of the statement of a declarant."

After such review, it is evident the affidavits do not provide the Court with any factual insight regarding how the existing facts, as applied the testator's Will, evidences an ambiguity. Therefore, this Court does not find a latent ambiguity in regards to the testator's intent.

II. THE CLAIMANT FAILED TO ESTABLISH A PATENT AMBIGUITY CONCERNING THE TESTATOR'S INTENT

If a testator's intent is not clear on the face of the document, or is subject to conflicting interpretations without resorting to existing facts, the intent is patently ambiguous. In the Matter of the Estate of Muriel H. Kirk, *supra*. Therefore, a testator's intent is clear and unambiguous if the intent can be determined from the four corners of the document. *Wilkins v. Wilkins, supra*.

In *State v. Salazar*, 95 Idaho 305, (1973), the Idaho Supreme Court found a patent ambiguity existed in the Court's record as to whether or not an exhibit had been admitted at trial. The Court ruled that it could not rely on the transcript provided by the court reporter because it was in *direct conflict* with the court clerk's minutes of the trial.

In the case at bar, Ms. Soignier has not provided this Court with any facts to substantiate a direct conflict with the intent of the residue clause. It is clear the testator intended to leave the residue and remainder of his property to the American Cancer Society and any beneficial trust interests to Mary Killins Soignier.

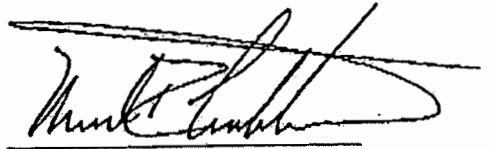
The fact that the testator did not have an interest in any trust at the time of his death does not create a conflict with his intent towards the American Cancer Society. His stated intent towards each beneficiary is clear, and his stated intent regarding Ms. Soignier does not come into direct conflict with any other portion of the Will. Therefore, this Court concludes that Ms. Soignier has failed to demonstrate the Will contains a latent ambiguity.

CONCLUSION

For the reasons set forth above, the American Cancer Society's Motion for Summary Judgment is granted. This Court finds as a matter of law that the testator's intent is clear and unambiguous on the face of the Will document. By virtue of this determination, this Court will not consider parole evidence for the purpose of interpreting the testator's intent.

Counsel for the Personal Representative will prepare an Order consistent with the foregoing, and submit the same to this Court for signing. Rule 77(d), Idaho Rules of Civil Procedure.

Date: September 18, 2007. Judge, Magistrate Division:



CERTIFICATE OF SERVICE

I hereby certify that on this 18 day of Sept., 2007, a true and correct copy of the foregoing Opinion Regarding Summary Judgment was served on the following in the manner noted:

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Clerk of the Court

By

C. Urquhart
Deputy Clerk